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Nos. 81-746 and 81-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON,

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*,

Cross-Petitioners,

v.

CITY OF AKRON.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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On Writs of Certiorari to The United States Court of Appeals For The Sixth Circuit

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational

Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist Black persons to secure their constitutional rights through litigation. Although the Legal Defense Fund's litigation program does not include cases involving abortion rights, the Fund is interested in any litigation which might result in formulating rules of law affecting rights of particular concern to Black people. The Fund has in the past participated in cases in which Blacks were not parties but the outcome of which might have important consequences for racial minorities. See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (sex discrimination, outcome of case important for implementation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.); Coker v. Georgia, 433 U.S. 584 (1977) (capital

punishment for rape held unconstitutional; defendant was White but the penalty had been applied disparately against Blacks). The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

Of primary concern to Amicus in this case is that the United States has proposed adoption of a rule of constitutional interpretation which, if adopted, would impair seriously the effectiveness of the Bill of Rights. We cannot help observing, also, that in view of economic realities an outcome of this case adverse to respondents-cross-petitioners could severely affect the poor, among whom Black women are represented disproportionately.[1/]

1/ The percentage of all Black women who live below the poverty level is approximately three times the percentage of White women living below the poverty level. U.S.

SUMMARY OF ARGUMENT

The Brief of the United States as Amicus Curiae urges the Court to accord "heavy deference" to legislative determinations in evaluating the constitutionality of burdens on fundamental rights which are particularly controversial. For the Court to establish such a precedent would seriously threaten the enjoyment of civil, political and personal liberties in the United States.

ARGUMENT

The case now before the Court concerns the constitutionality of a variety of state

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1/ continued

Bureau of the Census, CURRENT POPULATION REPORTS, Series P-60, No. 119, Characteristics of the Population Below the Poverty Level: 1977 p. 50 (1979). Moreover, Black women use legal abortion approximately twice as often as do White women. 38 PHYLON 280 (September 1977).

regulations that erect unduly burdensome and expensive obstacles in the paths of women seeking to exercise the constitutional right to terminate their pregnancies as recognized in Roe v. Wade, 410 U.S. 113 (1973). The Brief for the United States as Amicus Curiae advances the proposition that the Court should give "heavy deference" to the pronouncements of state legislatures regulating controversial fundamental constitutional rights, such as the right to abortion, and treats the regulations as mere public policy choices. Brief for the United States at 8-20.

The Brief of the United States is strikingly reminiscent of arguments encountered by Blacks and other racial and political minorities seeking vindication of their constitutional rights. For instance, during the oral argument in Brown v. Board of Education, 347 U.S. 483 (1954), counsel

for the State of Virginia maintained: "[T]he real crux of the whole matter is that there is involved fundamentally a policy question for legislative bodies to pass on, and not for the courts."[2/] Indeed, Plessy v. Ferguson, 163 U.S. 537, 550 (1896), held that the constitutionality of "separate but equal" was to be resolved by deciding "whether the statute of Louisiana [was] a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature."

The deference standard does not respect either the unique nature of constitutional rights in the United States or the role of the federal judiciary in resolving

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2/ 49 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 377 (P. Kurland and G. Cooper eds. 1975).

disputes over the exercise of those rights.[3/] In West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943) Justice Jackson, writing for the Court, recognized that:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political contro-

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3/ The Bill of Rights, as well as the Thirteenth, Fourteenth and Fifteenth Amendments, were designed to protect individual and majority rights against encroachment by majoritarian rule. See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938); A. Tocqueville, Democracy in America 158-159 (H. Reeves trans. 1947). Viscount Bryce, in commenting on the success of our federalism, lauded the role of the courts in our political system: "[B]y placing the Constitution above both the National and State governments, it has referred the arbitrament of disputes . . . to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfolder of the mind of the people whose will stands expressed in that supreme instrument." J. Bryce, The American Commonwealth, 348 (2d ed. 1889).

> versy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The deference scheme now proposed would dangerously alter the delicate balance between individual rights and majoritarian sentiment.

Statutes or regulations that affect the exercise of a fundamental right have been always closely examined by the Court.[4/] Yet now, not only is the Court

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4/ The process has been variously characterized as close scrutiny, Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966) (right to vote), or "exacting scrutiny," In Re Primus, 436 U.S. 412, 432 (1978) (freedom of association), and is undertaken whenever a fundamental right is threatened. See Citizens Against Rent Control/Coalition For Fair Housing v. Berkeley, ___ U.S.___, 50 U.S.L.W. 4071, 4072 (December 15, 1981)("regulation of First Amendment rights is always subject to

asked to defer to the legislative determination of what constitutes an unconstitutional burden on a fundamental right, it is asked to believe that "[t]o the extent constitutional values were implicated, those values were taken into account because legislators like other public servants, take an oath to uphold the Constitution." Brief for the United States at 9, n.5. But that is true in every case. Nevertheless, this Court has recognized that the oath taken by state legislators has not always been sufficient protection for minorities in our society. The massive

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4/ continued

exacting judicial review"); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) ("[t]he classification here touches on the fundamental right")(emphasis added); Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized")(emphasis added).

resistance to the enforcement of the mandate of Brown, frequently led by state legislatures and other political authorities, must surely be considered one of the sorriest chapters in this nation's history.[5/]

The United States' brief suggests that the impact of its deference standard can be limited to a narrow range of cases "where the issue might be fairly characterized as involving either a choice among competing policy alternatives, or a pronouncement of constitutional principle ...." Brief for the United States at 15. Careful

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5/ The Court found the violence existing in Little Rock in 1958 to be "directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the Brown case . . .." Cooper v. Aaron, 358 U.S. 1, 15 (1958).

consideration of its analysis, however, indicates that such a deference standard would apply to virtually every state and local action burdening any constitutional right. A "policy issue," in the brief of the government, is defined as one "subject to different views that are widely and fervently held." Id. at 13.[6/] It is difficult, if not impossible, to think of any

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6/ The United States' brief makes clear that the deference scheme would apply to constitutional rights other than privacy rights or the right to an abortion. See Brief for the United States at 17, n.13 (right to vote). Although the United States suggests that the courts need not "always yield to legislatures in areas of overlap between the power of each," id., at 15, the United States does not articulate any standards under which courts could determine when to defer to state or local legislative bodies. In fact, the rationale in support of the deference scheme offered by the United States is so devoid of content that it is impossible to view the United States' position as anything other than a general statement of political ideology.

issue involving a fundamental right or liberty that does not fit this mold.

This case deals with a fundamental right, albeit a controversial one. To now begin grading constitutional rights according to their controversiality would imperil our other basic constitutional rights. We strongly urge that the arguments proffered by the government be rejected by this Court.

Respectfully submitted,

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